

HSBC BANK (M) BHD

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v.

WUI LING TIMBER (BINTULU) SDN BHD & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING

b

IAN HC CHIN J

[CIVIL APPEAL NO: 11-07-2000]

23 NOVEMBER 2000

CIVIL PROCEDURE: *Summary judgment - Triable issues - Whether established - Rules of the High Court 1980, O. 14*

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HIRE PURCHASE: *Breach of agreement - Default in payment of instalments - Options available to innocent party - Whether suit was properly instituted*

The appellant/plaintiff sued the first respondent for RM21,716.01 being the amount and interest due under a hire-purchase agreement which the second respondent had undertaken to pay under an indemnity. Summary judgment was refused because the magistrate was of the view that the contentions of the respondents that: (a) the hire-purchase agreement must be terminated before the appellant could claim for rentals or charges due thereunder; (b) the hire-purchase agreement was assigned to a third party with the consent of the appellant relieved the first respondent from all liability; (c) there was no reminder or demand received by the respondents with the result that they were unaware of the defaults; and (d) the rate of 12.96% was illegal as it contravened s. 34(c) of the Hire-Purchase Act 1967, raised triable issues.

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The issue for consideration was whether the magistrate had erred in failing to further consider whether the argument of the respondent was misconceived or plainly unsustainable or unarguable.

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Held:

[1] The failure to pay rentals constituted a breach of the hire-purchase agreement which the appellant could sue and the damages would be the instalments due plus interest but less whatever sums which the hire-purchase agreement provided for.

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[1a] The innocent party, in this case the appellant, can elect either to accept the repudiation of the hire-purchase agreement for the failure to pay the rentals or keep the hire-purchase agreement alive and sue for the rentals, which the appellant in fact did.

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- a* [2] There was no proof that the appellant had consented to an assignment to a third party.
- [3] The letter of demand was sent by registered post to an agreed address of the first respondent under cl. 21 of the agreement to be received by the first respondent. It is not enough therefore for the first respondent to merely say that they had not received it. They should have procured a letter from the postal authority to state that such a registered letter was not posted or delivered to the said address.
- b*
- c* [4] The subject matter of the hire-purchase was not a scheduled good and the fact that a different interest rate had been agreed upon means that the parties had decided not to follow that provisions of the Hire-Purchase Act 1967, which they were allowed to do. Furthermore the discretion to vary the interest rate was given to the appellant by the agreement itself.
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[Appeal allowed.]

Case(s) referred to:

- e* *European Asian Bank AG v. Punjab & Sind Bank (No 2)* [1983] 1 WLR 642 (*refd*)
Home and Overseas Insurance Co Ltd v. Mentor Insurance Co (UK) Ltd (In Liq) [1990] 1 WLR 153 (*refd*)
Keppel Finance Ltd v. Phoon Ah Lek [1994] 3 MLJ 26 (*refd*)
Lee Wah Bank Ltd v. Joesph Eu [1981] 1 MLJ 11 (*refd*)
RP Doobay & Ors v. Mohabeer [1967] 2 All ER 760 (*fol*)
United Malayan Banking Corporation v. Pembinaan KSY Sdn Bhd & Ors [1993] 3 CLJ 612 (*refd*)
- f*

Legislation referred to:

Civil Law Act 1956, s. 11
 Hire-Purchase Act 1967, s. 34(c)
 Rules of the High Court 1980, O. 14

- g* **Other source(s) referred to:**

Lewinsham, *Interpretation of Contracts*, p 56, para 3.04

For appellant - Ee-Shu Yen; M/s Ee & Lim Advoc

For respondent - Siti Emiliana Mohamad Edmund; M/s Arthur Lee, Lin & Co Advoc

- h* *Reported by Mariette Peters-Goh*

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JUDGMENT

Ian HC Chin J:

Introduction

The appellant/plaintiff HSBC Bank Malaysia Berhad had sued the 1st respondent/defendant Wui Ling Timber (Bintulu) Sdn Bhd for RM21,716.01 being the amount and interest due under a hire-purchase agreement which amount the 2nd respondent/defendant had undertaken to pay under an indemnity. Summary judgment was refused on 8 June 2000 because the magistrate was of the view that the contention of the respondents that the hire-purchase agreement must be terminated before the appellant can claim any rentals or charges due thereunder raises a triable issue. That should immediately bring to mind the reminder of *Lee Wah Bank Ltd v. Joesph Eu* [1981] 1 MLJ 11 where it reiterated that “where all the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the assistant registrar or the judge in chambers, or, for that matter this court, shall not deal with the whole matter under the RHC O. 14 procedure.” Since there is no factual dispute relating to this issue and the issue is one of a question of law, being the construction of the terms of the hire-purchase agreement, the magistrate should have stopped there but should have proceeded further to consider whether the point raised by the respondents is misconceived or plainly unsustainable or unarguable (*Home and Overseas Insurance Co Ltd v. Mentor Insurance Co (UK) Ltd (In Liq)* [1990] 1 WLR 153; *Keppel Finance Ltd v. Phoon Ah Lek* [1994] 3 MLJ 26). As for the question of law the Supreme Court in *United Malayan Banking Corporation v. Pembinaan KSY Sdn Bhd & Ors* [1993] 3 CLJ 612 approves of the following that was said by Goff LJ in *European Asian Bank AG v. Punjab & Sind Bank (No. 2) (CA)* [1983] 1 WLR 642, viz.:

But where the appeal raises a question of law, this court may be more ready to interfere. Moreover, at least since *Cow v. Casey* [1949] 1 All ER 197, [1949] 1 KB 474, this court has made it plain that it will not hesitate, in an appropriate case, to decide questions of law under O. 14, even if the question of law is at first blush of some complexity and therefore takes ‘a little longer to understand’. It may offend against the whole purpose of O.14 not to decide a case which raises a clear-cut issue, when full argument has been addressed to the court, and the only result of not deciding it will be that the case will go for trial and the argument will be rehearsed all over again before a judge, with the possibility of yet another appeal.

- a* The magistrate was therefore wrong to have ordered the matter to go to trial without going further to consider whether the argument put forth was misconceived or plainly unsustainable or unarguable. I will therefore proceed to deal with this issue before the others as the magistrate found that the other defences do not raise any triable issue which decision I agree.

b **Whether The Hire-Purchase Agreement Needs To Be Terminated**

This issue was not in fact raised in the defence but only in the affidavit filed in opposition to the summary judgment application but the point was not taken. This issue turns upon the meaning of the following provisions of the hire-purchase agreement without the need to consider any matrix of facts since they do not bear on the meaning, viz:

- c* 4.2 Punctual payment of the hire rentals shall be of the essence of this Agreement and the Hirer shall be deemed to have repudiated this Agreement if any hire rental or part thereof shall remain unpaid for more than fourteen (14) days after becoming due.
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15. Termination by Owner

- e* 15.1 If during the hiring
- f* (a) the Owner discovers that the Hirer has made a false statement in the Hire Purchase Proposal form; or
- (b) any cheque given by the Hirer to the Owner as payment or part payment of any sums payable under this Agreement is dishonoured; or
- g* (c) any goods traded in by the Hirer are found not to be his absolute unencumbered property; or
- (d) the Hirer shall default in payment of the deposit or any of the hire rentals or any other sums payable under this Agreement; or
- h* (e) if a judgment against the Hirer remains unsatisfied for more than fourteen (14) days or if the Hirer commits an act of bankruptcy or have a receiving order made against him or shall make any arrangement with his creditors or any assignment for the benefit of such creditors or being a company winding-up proceedings are initiated or the Hirer enter into liquidation whether compulsorily or voluntarily (otherwise than for the purpose of a genuine amalgamation or reconstruction) or a receiver or trustee is appointed for any purpose; or
- i* (f) distress or execution shall be levied or threatened upon the Goods of the Hirer; or

(g) the Hirer shall fail to observe or perform any of the terms and conditions contained in this Agreement; or **a**

(h) the Hirer has been convicted of a criminal offence; or

(i) the Hirer shall do any act or thing which may prejudice or jeopardise the Owner's rights of ownership of the Goods; or **b**

(j) the Owner shall for any reason consider itself insecure, or

(k) the Hirer shall abandon the Goods.

Then, in any of the said events, the Owner shall be entitled to immediate possession of the Goods and the Owner may, without prejudice or any other rights and remedies it may have under this Agreement: **c**

I. immediately terminate this Agreement without notice and resume possession of the Goods and for this purpose enter upon any land or building on or in which the Goods are or are believed to be and if the Goods or any part thereof are affixed to any land or building the Owner shall be entitled to sever the same therefrom and the Hirer shall be responsible for all damage caused to the land or building by such removal; **d**

OR

II. by written notice to the Hirer determine and end this Agreement and thereupon the Hirer shall no longer be in possession of the Goods with the Owner's consent and the Hirer shall not thereafter have any rights under this Agreement. **e**

15.2 Upon termination pursuant to sub-clause 1 above the Hirer shall forthwith deliver up possession of the Goods to the Owner at the address specified herein or at such other address as the Owner may specify in writing and the Hirer shall also return to the Owner all registration books, insurance certificates and policies and licences relating to the Goods and shall pay to the Owner the unpaid balance of the hire-purchase price and other sums payable under this Agreement, less **f**

(a) the net proceeds of sale of the Goods if repossessed and sold, and **g**

(b) a rebate, if any.

15.3 If the Owner shall for any reason whatsoever be unable or unwilling to resume possession of the Goods the Owner, shall, be entitled at its option, *in lieu* of resuming possession of the Goods, to recover from the Hirer the unpaid balance of the hire-purchase price less a rebate (if any) plus all other sum payable under the Agreement. **h**

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- a* The legal background against which the contract was made may influence the construction of the contract since the parties always negotiate against the background of the law (Lewisham on *Interpretation of Contracts*, p. 56, para. 3.04). That being the case it is reasonable to assume that the parties have taken into consideration the provisions of the Hire Purchase Act 1967 even though the goods in this case is a diesel electric generating set which clearly is not any of the scheduled goods. That the parties have used documents and provide for conduct which are those provided under the Act, is a clear indication that the provisions of the Act shall govern their relationship unless the contract provides otherwise. Under the Act
- c* certain conditions must be satisfied before the owner can repossess and one of these is that the hirer must have fallen into arrears in payment by two instalments. Therefore, there is a prohibition under the Act against repossession unless the payment has fallen into arrears by two instalments (or four in the case of a deceased hirer) but there is no prohibition against the owner suing for the payment of any instalment. Therefore, nothing turns
- d* on this statutory legal background. I turn now to the common law position where an agreement has been breached or repudiated by one party. It is trite law that the innocent party, in this case the appellant, can elect either to accept the repudiation of the hire-purchase agreement for the failure to pay the rentals under cl. 4.1 or to keep the hire-purchase alive and sue
- e* for the rentals which the appellant did. The failure to pay rentals constitute breaches of the hire-purchase agreement which the appellant can sue and the damages would be the instalments due plus interest but less whatever sums which the hire-purchase agreement provides under cl. 15.3. None of the terms of the hire-purchase agreement can justify the conclusion that
- f* unless the hire-purchase agreement is terminated the appellant cannot sue to recover rentals already due. It had been done before, for example in *R.P. Doobay & Ors v Mohabeer* [1967] 2 All ER 760 where the owner, though he had not terminated the agreement, was nevertheless entitled to sue for all the instalments due thereunder and remaining unpaid though that
- g* was not an issue. It was held that the hirer was entitled, though the agreement was not terminated, to sue for damages for the owner's failure to comply with his obligation to put a rice mill (the subject of the hire-purchase agreement) in working order. I turn now to the other defences which I have earlier said I agree with the magistrate that they do not merit
- h* any trial.

Other Defences

- i* One defence was that the hire-purchase agreement was assigned to a third party with the consent of the appellant which relieved the respondents from all liability. Under cl. 11.3 of the hire-purchase agreement the respondent

must obtain the prior written consent of the appellant before they can assign it. The appellant had denied ever giving such consent and the respondents, in support of that defence, produced two self-serving letters that were issued to the appellant after the summons was served. One dated 30 October 1999 came from the 1st respondent stating the following: *a*

Please be informed that Bikonice Sdn Bhd will be settling the above account on our behalf. Kindly release and discharge all relevant documents to Bikonice Sdn Bhd upon full settlement of the account. *b*

The other dated 21 December 1999 came from the advocates for the third party and it says: *c*

We have been instructed by our client to inform and propose to your bank as follows:

1. that (the 1st Respondent) have disposed off the aforesaid Machinery to our client at a sum of RM24,000.00; *d*
2. that our client shall pay the said sum to the abovesaid Vendor by way of 10 monthly Instalments of RM2,400.00 per month PROVIDED ALWAYS that such instalment shall be paid to your Bank directly to settle the outstanding sum due to your Bank by the abovesaid Vendor

Kindly confirm as to whether your Bank will accept the abovesaid proposal ON URGENT BASIS. We wait for your early reply. *e*

The relevant parts of those documents need only be reproduced to show the absurdity of the contention that there was an assignment of the hire-purchase agreement. It is sad that the court has to deal with such argument. *f*

The next defence asserted was that there was no reminder or demand received by the respondents with the result that they were unaware of any defaults. Letter of demand was sent by registered post to an agreed address of the 1st respondent and deemed under cl. 21 to have been received by the 1st respondent. It is not enough for the 1st respondent to merely say they have not received it but they must go further to procure a letter from the postal authority to state that such a registered letter was not posted or delivered to the said address. This was not done. As for the 2nd respondent not receiving any notice, the agreement does not contain any provision for him to be informed of the default by the 1st respondent in the payment of the rentals. The next defence is that the interest rate of 12.96% is illegal since it is in excess of s. 34(c) of the Hire Purchase Act which renders a provision providing for default interest above 8% p.a. to be void but the Act does not apply since the engine, the subject matter of the hire-purchase is not a scheduled good and the fact that a different *g*
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- a* interest rate has been agreed means the parties have decided not to follow the provision of the Act which they can lawfully do. The appellants then argued that the interest of 12.96% p.a. cannot be charged as the original interest rate was 18% which, it was argued, was excessive. The discretion to vary the interest rate is given to the appellant by cl. 10 the operative words of which were that the appellant may “in its absolute discretion from time to time vary the said rate”. Apart from saying that it is excessive the respondents did not cite any authority to say how such a rate agreed by the parties cannot be enforced. It was then argued that the appellant is asking for interest upon interest in contravention of s. 11 of the Civil Law Act 1956 but that section expressly states that it has no application to an agreement providing for the payment of such interest. The defence then went on to state that the engine was not delivered but the 1st respondent did not deny his signature to an acknowledgement of receipt of the engine. Finally the defence that there was a failure on the part of the appellant to mitigate. The appellant is suing for the rentals due under the hire-purchase agreement whilst the engine is still legally under the control or possession of the 1st respondent. Therefore, any alleged duty founded on the premise that the appellant is in possession of the engine cannot succeed since the engine is still under the control or possession of the 1st respondent. Again, there is no triable issue.

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Conclusions

- f* In the premises the appeal is allowed. The order of the magistrate is set aside and there will be judgment for the appellant against the respondents for the sum of RM21,716.01, interest at 12.96% per annum calculated on a daily basis within monthly rests from 26 February 1999 until payment and costs on a solicitor and client basis both here and below.

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